No. 82-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN McCOY and KAREN McCOY,

Petitioners,

v.

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State of Washington

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is constitutional under the First and Fourteenth Amendments for a court to prohibit publication of information learned in the course of civil discovery in the absence of either a showing of specific harm caused by publication or a particularized examination of the need for a restriction upon publication.

2. Whether it is constitutional under the First and Fourteenth Amendments for a court to enter an order prohibiting publication of information learned in the course of civil discovery upon a mere showing of "good cause."

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The petitioners respectfully pray that this Court vacate the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on December 2, 1982.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982), and appears in the Joint Appendix at pages 100a through 149a.

JURISDICTION

The judgment and opinion of the Washington Supreme Court was entered on December 2, 1982, and amended on December 13, 1982. The court denied a timely motion for reconsideraton on January 27, 1983. Petitioners filed the Petition For a Writ of Certiorari on April 22, 1983, which this Court granted on October 3, 1983. The Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States and Civil Rule 26(c) of the Washington Rules for Superior Court, which are found in the Appendix to this Brief.

STATEMENT OF THE CASE

This case arises from an action for defamation and invasion of privacy brought by Keith Milton Rhinehart, head of the Aquarian Foundation, the Foundation, and certain members of the Foundation. Petitioners, who are defendants in the trial court, include the Seattle Times, the Walla Walla Union-Bulletin, and several journalists currently or formerly employed by those newspapers. The action involves articles that the newspapers published in April 1973, February, March, and April 1978, and November 1979.[1]

[1] The articles themselves are not in the record. Portions that are the subject of plaintiffs' suit are attached to their complaint. *See* Joint Appendix (hereinafter "JA") 20a-29a. The record below also consists of seven volumes of the Clerk's Papers (hereinafter "CP"), one volume of the Supplemental Clerk's Papers ("hereinafter SCP"), and two volumes of the Second Supplemental Clerk's Papers (hereinafter "SSCP").

Pleadings.

Plaintiffs alleged that the defendants had falsely and with actual malice portrayed Rhinehart and his Foundation as religious and financial charlatans. They contended that defendants' coverage of their activities had damaged their reputation, created shame, humiliation, and embarrassment among certain individual members of the Foundation, caused a loss in Foundation membership, increased the Foundation's expenses, impaired Rhinehart's ability to communicate with Foundation members, and caused a decline in contributions and donations from members and the public.

Plaintiffs sought $14,100,000 in damages, claiming that they were defamed by newspaper disclosures that Rhinehart is a "Jim Jones Guyana-like leader" of a "bizarre Seattle cult" who demands that his followers worship him but who is "unfit to be a religious leader," that Rhinehart's public exhibitions are "consciously perpetrated frauds" and his seances a "ripoff," that the Foundation is, in fact, Rhinehart's "alter ego," with "no segregation of money or contributions" between Rhinehart and the corporation, that the Foundation uses its "wealth to buy religious converts," and that Rhinehart makes his money "by selling fraudulently-produced stones" and "dime store jewelry" as "apported" gems for "thousands of dollars." (JA 7a-9a.) Plaintiffs also attacked defendants' description of a so-called "religious program" presented in 1978 to inmates at the Walla Walla State Penitentiary "during which Keith Milton Rhinehart appeared costumed in women's clothing." (JA 12a.)

In their answer (JA 32a-36a), defendants denied that plaintiffs had suffered any defamation or invasion of privacy. They asserted that the articles were substantially true and accurate and that publication was privileged and protected from liability by the United States and the Washington constitutions.

Discovery Problems.

The Protective Order arose from the Seattle Times's efforts to wrest discovery from Rhinehart about the allegations in his complaint. The initial discovery provided by Rhinehart was incomplete. For example, although he claimed substantial

damages for the loss of membership and contributions to the Foundation (CP 502-503), Rhinehart refused to provide information about these claims (CP 511-514). He also refused to produce requested documents, claiming *(inter alia)* that his own copyright prohibited him from making any copies available (CP 359). Arguing that they were "severely hampered by . . . Rhinehart's efforts to place obstacles in the way of any discovery which might cast light on the veracity of the Seattle Times's accounts of him, his colleagues, and his organization" (CP 345), defendants moved for an order compelling discovery (CP 365-367). In support of their motion, defendants noted that the principal discovery battle involved "plaintiffs' refusals to permit any effective inquiry into their financial affairs" and asserted that such "material is of crucial importance and relevance to this proceeding." (CP 350.)

Motion for Protective Order.

Plaintiffs resisted the motion and sought a protective order to bar defendants from publishing anything learned in the course of civil discovery. To further limit coverage by the newspapers, plaintiffs argued:

> [T]he defendants should be prohibited from using information which they have obtained through discovery, even though the same information may have been obtained independently without first establishing to the satisfaction of the court that there was a truly independent source for the information.

(SSCP 127.)

Defendants' Response.

The Seattle Times argued that the proposed order would be an unconstitutional prior restraint and that the threat to First Amendment rights was "aggravated by the fact that these orders are requested in the context of a libel action which, itself, seeks to punish the defendants for prior publications, and which has an inherent (and presumably intended) effect of chilling future exercise of First Amendment rights." (CP 326.)

Defendants submitted a copy of a recent Seattle Times article by defendant Erik Lacitis, in which he discussed allegations that Rhinehart and the Foundation had "systematically

brought lawsuits against any members who tried to leave, or who might have damaging information" in "an attempt to insure their silence," that they "have routinely sued various members of the public media" to force their silence as well, and that the current lawsuit represents "an effort by Rhinehart to harrass and intimidate the press from writing about him." (CP 335.) A protective order in these circumstances, defendants argued, would transform the indirect impact on First Amendment rights resulting from the lawsuit into a direct halt to all news coverage of plaintiffs' activities.[2]

Initial Ruling.

The court ruled that defendants were entitled to discovery into the merits of plaintiffs' claims, including information relating to plaintiffs' finances and to alleged membership, contribution, and donation losses (JA 66a-88a). The court denied the motion for a protective order, without prejudice to plaintiffs' right to move for such an order with respect to specific discovery materials and a factual showing under *In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979). The court also held that plaintiffs must answer certain of the interrogatories.

Plaintiffs' Affidavits for Reconsideration.

Plaintiffs moved for reconsideration and again pressed for a protective order (CP 279-281). Plaintiffs submitted several affidavits, which recounted various threats or incidents of violence in the vicinity of the Foundation's offices in Seattle since 1978 and advanced numerous reasons why news coverage of their activities should be curtailed or halted. They attacked defendants' articles and attributed the threats or incidents to the unfavorable publicity in these articles.

Robert Plante, a Foundation employee, filed an affidavit (JA 94a-99a) which declared that "threatening phone calls . . . would begin to filter in" whenever the Seattle Times wrote "an article . . . in reference to the Aquarian Foundation." (JA 97a.) He catalogued a series of incidents, including a 1978 altercation with someone who had visited the Foundation, made verbal

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[2] The Lacitis article is now the subject of another defamation suit, *Rhinehart v. Seattle Times,* No. 82-2-17487-4 (King County Super. Ct., filed Dec. 17, 1982).

threats against Rhinehart, and "opened his shirt to reveal that he was wired with instruments and listening devices." (JA 95a.) He also described a mugging incident, an alleged bombing incident, and two encounters with deranged individuals that had occurred in the neighborhood several years earlier, and accused the Seattle police of not taking his complaints seriously. In 1979, after he and Rhinehart were arrested in Bogota, Colombia, on charges of necromancy and witchcraft, Plante concluded that a Seattle Times reporter "was again feeding false and evil material to the media." (JA 98a.) Plante blamed the "slanderous articles" in the Seattle Times, the "noncooperation" of the Seattle police, "and also the intrusion and/or infiltration of the Aquarian Foundation by authorized agents of governmental agencies" for causing his heightened fears and increased workload and declared that, "because of intense fear and anxiety," he had chosen to leave Seattle, "the town I love, and I do not know when or if I will be able to return." (JA 98a.)

Catherine Harold, the Foundation's secretary, submitted an unsworn affidavit (JA 83a-93a) chronicling the same general list of disturbances. Her affidavit further asserted:

> Upon information and belief and knowledge of the numerous death threats directed toward the Aquarian Foundation, it's [*sic*] members, and it's [*sic*] founder since the publication of false and defamatory articles about them in the *Seattle Times* and the *Walla Walla Union Bulletin,* the Affiant is of the opinion that this incident [a drawing of a skull and cross-bones and an eight ball] . . . is another attempt to seriously torment and harm the Aquarian Foundation, it's [*sic*] founder, and it's [*sic*] members that would not have occurred had the aforesaid articles not been published.

(JA 92a.)

The Affidavit of Linda Dunn (JA 45a-48a) declared that since 1978 the Foundation had received several threatening telephone calls and had also encountered several deranged members of the public. As a result of unfavorable publicity, she

added, attendance at Foundation events had steadily declined. Because she knew of "no threatening incidents" prior to defendants' publication of articles about Rhinehart in 1973, Dunn declared that the incidents had all occurred "as a direct result of all said articles." (JA 48a.)

Defendants' Constitutional Arguments.

The Seattle Times responded by again outlining the constitutional deficiencies in plaintiffs' arguments (CP 212-253) and arguing that the affidavits represented "an unprecedented and completely unconstitutional attempt to halt any and all public commentary on the activities of this self-proclaimed religion." (CP 218.) Reminding the court that the First Amendment required that plaintiffs make a "particular and specific demonstration of fact" (CP 216) before a court could abridge expression, defendants asked the court to adhere to its earlier ruling.

Defendants also submitted an affidavit (CP 130-211) attesting to the relevance and importance of Rhinehart's financial data to their case. The affidavit alleged that "significant amounts of funds are paid to Rhinehart over and above his salary" from the Foundation, that Rhinehart was "soliciting funds from members to retire a mortgage against a condominium he owns," and that Rhinehart personally derives significant cash flow from his "gemstone program," in which he sells "allegedly sacred objects" in return for substantial cash contributions from members (CP 131-133).

Protective Order.

On June 12, 1981, the court issued its Opinion Granting Plaintiffs' Motion for Protective Order (JA 51a-54a). The court concluded that plaintiffs had shown "reasonable grounds for the issuance" of a protective order prohibiting defendants from publishing any information learned in discovery about plaintiffs' "financial affairs" and various individuals' names and addresses (JA 53a).

Protective orders, the court noted, "are entered routinely . . . where the party seeking the Protective Order has a reasonable basis for its request. . . ." (JA 52a.) The court observed

that protective orders were adopted "in the first place" to promote "production of information normally kept confidential" and "to protect a party from abuse or embarrassment." (JA 54a, 52a.) The court reasoned:

> If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

(JA 54a.)

On June 26, 1981, the court entered the Protective Order (JA 64a-65a). The order listed certain categories of information that "defendants . . . shall make no use of . . . other than such use as is necessary in order to . . . prepare and try the case." The order also declared broadly that "information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination." The order contained no provision concerning its duration or its application to materials available in public records or revealed in open court.

Appeal Proceedings.

On December 2, 1982, the Washington Supreme Court upheld the Protective Order. Analyzing the Protective Order as a classic prior restraint, five members of the court nonetheless rejected petitioners' First Amendment arguments and held that "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification" for the restraint in question (JA 130a). Where civil discovery is involved, the court concluded, freedom of expression may be abridged "if the moving party shows that any of the harms spoken of in the rule [*i.e.*, annoyance, embarrassment, oppression, or undue burden or expense] is threatened

and can be avoided without impeding the discovery process." (JA 130a.) Justices Utter and Pearson dissented, arguing that no specific harm had been identified, that First Amendment interests were given no recognition, and that "the order does not reflect the narrowness which derives from a concern for such interests." (JA 149a.)

SUMMARY OF ARGUMENT

Litigants do not surrender their First Amendment rights at the courthouse door. The First Amendment includes the right to discuss publicly and truthfully all matters of public concern, including information relating to pending lawsuits, even if it originates during civil discovery and even if it is factual in nature. Civil litigation is itself a newsworthy matter and frequently involves matters of public concern. In the area of defamation, where the cause of action is premised upon allegations that the public has received false information, the litigants' interest in prompt dissemination of correct information is particularly strong. Because civil discovery functions as a integral element of the judicial system, public interest in dissemination of information can be presumed.

The fact that plaintiffs obtained the order enjoining publication in the course of their defamation action aggravates the damage to First Amendment values. Plaintiffs have managed to obtain unprecedented injunctive relief for defamation. Furthermore, contrary to the assumptions of the Washington Supreme Court, unfavorable publicity is the essence of what the First Amendment was designed to protect. Even where publicity might embarrass or annoy a litigant, the state cannot rely upon that justification to support an abridgment of free expression. Because pretrial discovery is a presumptively public process, the court must give appropriate recognition to First Amendment interests.

The Washington Supreme Court refused to determine whether this particular instance required a ban on publication and instead examined only the general governmental interests which justify "protective orders in circumstances such as these."

(JA 105a.) Although the state possesses the authority to control conduct that tends directly to prevent discharge of judicial functions, it must advance a compelling interest to support any infringement of the rights of free speech and expression and must demonstrate that the infringement is narrowly tailored to serve that interest. Freedom of expression, accordingly, must be given the widest possible range compatible with the essential requirement of a fair and orderly administration of justice. Generalized and speculative arguments, unsupported by evidence, are plainly insufficient to justify the restraint here.

Petitioners ask this Court to protect their legitimate First Amendment interests in dissemination of newsworthy information acquired during the course of civil discovery. When a protective order seeks to limit expression, it may do so only if the proponent shows a compelling governmental interest. Mere speculation and conjecture are insufficient. Any restraining order, moreover, must be narrowly drawn and precise. Finally, before issuing such an order a court must determine that there are no alternatives which intrude less directly on expression. The order below is plainly deficient and should be vacated.

ARGUMENT

I.

PETITIONERS POSSESS A SUBSTANTIAL FIRST AMENDMENT RIGHT TO DISSEMINATE NEWSWORTHY INFORMATION

A. The First Amendment Protects The Right To Discuss Litigation And Other Matters Of Public Concern.

The Washington Supreme Court determined that discussion of any information uncovered in pretrial proceedings is presumptively illegitimate because civil discovery is a private process (JA 106a-109a). The basis for its conclusion is not altogether clear, since the court asserted variously that petitioners' First Amendment interests could be disregarded because they were litigants subject to judicial control, because the information was purely factual in nature, and because news

coverage of religious groups was not of legitimate interest to the public. The court held that freedom of expression in these circumstances would be tolerated only insofar as it "will in any way tend to promote the proper functioning of [pretrial] proceedings." (JA 129a.) Although it acknowledged that the information would be newsworthy if it were published, the court reasoned that civil litigants must be granted protective orders to prevent any "unwanted publicity" arising from their lawsuits (JA 128a).

This narrow view of the First Amendment contrasts sharply with the broad system of freedom of expression that this Court has articulated. The First Amendment "embraces . . . the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama,* 310 U.S. 88, 101-02 (1940). *See also Abood v. Detroit Board of Education,* 431 U.S. 209, 231 (1971); *Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967). The right to disseminate information learned in civil litigation is rooted in the basic First Amendment "principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). When there is "information of potential interest and value to a diverse audience," the First Amendment protects the right to communicate that information. *Bigelow v. Virginia,* 421 U.S. 809, 822 (1975).

Lawsuits are themselves newsworthy and frequently involve matters of public concern. This Court has characterized civil litigation as a "means of communicating useful information to the public." *In re Primus,* 436 U.S. 412, 431 (1978). Furthermore, this Court has held that civil litigation is itself a First Amendment activity. *NAACP v. Button,* 371 U.S. 415, 429 (1963). As our society has become increasingly regulated and litigious, civil litigation has become a major focus of public inquiry and concern. When litigants invoke the judicial process, they are participating in a public function. Public issues often first emerge in private litigation, such as labor-management disputes, lawsuits over toxic torts and occupational diseases, securities and antitrust matters, products liability actions, discrimination claims, consumer cases, bankruptcy proceedings, and even controversies involving major league sports franchises

and players. *See generally Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-80 (6th Cir. 1983). The public has a keen interest not only in the outcome of such litigation but also in any newsworthy information generated by those lawsuits.[3]

The Washington Supreme Court's pronouncement that the public generally does not have much interest in the conduct of civil actions or in knowing what information is uncovered in such actions (JA 127a-129a) reveals an unnecessarily cramped view of what are matters of public concern. The activities of a religious organization is clearly of public interest, particularly when that organization aggressively proselytizes, seeking both recruits and financial contributions from the general public. The Washington Supreme Court assumed that it is only when the activities of a religious organization descend to the level of criminal conduct that the general public has any legitimate interest in its affairs (JA 129a). But surely this cannot be, especially when the organization itself admits that it relies on appeals to the general public for continuing financial support (JA 9a). If plaintiffs' organization targets the general public, then the public has a right to be informed about the nature and conduct of that organization in order to make an informed choice whether to lend or withhold support. This Court has held that a consumer of drugstore items has a right of access to information that will enable him to make a reasoned choice.

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[3] Given today's crowded civil dockets, routine issuance of restrictive protective orders would permit information to remain concealed for many years. *See In re Halkin*, 598 F.2d 176, 193 n.40 (D.C. Cir. 1979); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) (en banc) (per curiam); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). "Fragile First Amendment rights are often lost or prejudiced by delay." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 470 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). In *Bridges v. California*, 314 U.S. 252, 268 (1941), this Court recognized that a restriction on pretrial discussion often produces its "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height." Because the overwhelming majority of civil cases are settled prior to trial, *see* Kaufman, *Judicial Reform in the Next Century*, 29 Stan. L. Rev. 1, 1 (1976), broad inhibitions upon pretrial commentary would also have potentially irreparable effects.

Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). This principle can be no less applicable when the consumer is asked to buy a package of religious beliefs, an ideological commitment, a loyalty to a charismatic leader, and a code of conduct.

In a defamation lawsuit, particularly, where the cause of action itself is premised upon allegations that the public has received false information, the plaintiff, the defendant, and the public all have an interest in prompt determination of the truth or falsity of matters already in the public domain. This Court has stated that the "first remedy" for any falsehood is "self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). As Justice Brandeis observed, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In these circumstances, freedoms of speech and publication have a vital role in generating prompt and accurate information.

B. Petitioners' Status As Litigants Does Not Create An Exemption From First Amendment Requirements.

Lawyers and litigants are often the best informed and, indeed, the most accurate—sources of information about pending civil litigation. The parties themselves, with their opposing interests and their close involvement with the issues, are ideally situated to provide balanced and full factual data on all matters of public interest relevant to pending litigation. When a protective order silences one side of the discussion while leaving the other free to canvass and proselytize, as was done here, the public is effectively denied its First Amendment right to receive information on matters of public interest and concern. *See Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 756-57.

That the Protective Order arose in civil litigation does not preclude the application of the First Amendment. Courts exercise broad supervisory authority over the conduct of civil discovery and other pretrial proceedings but neither the "broad

management powers" granted by court rules nor the "general authority to regulate the conduct of litigation" creates an exception to basic principles underlying freedom of expression. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). As the Third Circuit observed in a similar context, the general judicial interest "in the proper administration of justice does not authorize any blanket exception to the First Amendment." *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 420 U.S. 969 (1975). This Court recently noted in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365, 1376, 75 L. Ed. 2d 295, 309 (1983), that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."

That the Seattle Times was drawn into litigation by Rhinehart does not alter basic constitutional principles. *See National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981) ("mere status of involvement in a lawsuit" does not limit First Amendment rights); *CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975) (per curiam) (gag order of litigants is "presumptively void" under First Amendment). If "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), it seems axiomatic that "lawyers and litigants [do not] surrender their First Amendment rights at the courthouse door." *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979). Moreover, many political questions in the United States are resolved as judicial questions. A. de Tocqueville, *Democracy in America* 248 (J. Mayer & M. Lerner eds. 1966). First Amendment protection in these circumstances should be consistent with the broad role civil litigation plays in our increasingly complex society.[4]

[4] The state's legitimate interest in upholding the integrity of its judicial processes does not require that parties automatically waive or abandon the protections of the First Amendment when they become involved in civil litigation. *See Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (although state has legitimate interest in integrity of its electoral processes, a political candidate does not lose the protections of the First Amendment when he runs for office).

The existence of broad judicial authority to manage litigation does not dispose of First Amendment concerns. For example, although the state has "broad power" to regulate attorneys, this Court has held that when judicial rule-making sweeps so broadly as to affect the exercise of First Amendment freedoms, the state must demonstrate that it has a compelling interest and that the means it employs to further that interest are "'closely drawn to avoid unnecessary abridgment'" of First Amendment rights. *In re Primus,* 436 U.S. at 422, 432 (quoting *Buckley v. Valeo,* 424 U.S. 1, 25 (1976)).

C. The Order Restricts Protected Speech.

The information affected by the Protective Order does not fall within any of the historic and well-established categories of unprotected speech. These "well-defined and narrowly limited classes of speech," *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571 (1942), include so-called fighting words, *id.* at 572; obscenity, *Miller v. California,* 413 U.S. 15, 23 (1973); incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969); and, to a limited extent, commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562-63 (1980); and some types of defamatory falsehoods, *Gertz v. Robert Welch, Inc.,* 418 U.S. at 340. Significant First Amendment interests attach to information revealed in the course of civil discovery because such information cannot be characterized as "a class of utterances of 'no essential part of any exposition of ideas' or of 'slight social value as a step to truth.'" *Halkin,* 598 F.2d at 188 (quoting *Chaplinsky v. New Hampshire,* 315 U.S. at 572).

Facts are a basic element of expression and the publication of factual data unaccompanied by "advocacy or abstract discussion" (JA 122a) is well within the protection of the First Amendment. Freedom of expression cannot survive on advocacy alone. To be effective, advocacy should be informed, not ignorant. As this Court has noted, the "informational purpose of the First Amendment" requires that "public debate must not only be unfettered; it must also be informed." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 782 n.18 (1978)

(quoting *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting)). Suppressing words risks suppressing ideas. *Cohen v. California*, 403 U.S. 15, 26 (1971). The suppression of facts can result in even greater injury. The decisions of this Court have repeatedly stressed that, even where information is purely factual, its publication is constitutionally protected. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). "Purely factual matter of public interest may claim protection" under the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 762.

The fact that the information at issue originated in compulsory judicial processes does not alter these basic principles. There is no special mystique about the civil discovery process that distinguishes it from other sources of newsworthy information.[5] "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ." *First National Bank of Boston v. Bellotti*, 435 U.S. at 778. Thus, in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), this Court held that a restraining order to block publication of stolen government documents relating to the history of the Vietnam War was unconstitutional. The right to publish should be "far stronger" where relevant and newsworthy information is lawfully obtained through civil litigation. *Halkin*, 598 F.2d at 188; *see Smith v. Daily Mail*, 443 U.S. at 101-04.

The fact that the information emerged in compulsory judicial processes does not warrant denying First Amendment protection. In *Nebraska Press* this Court struck down a pretrial order forbidding disclosure of testimony given or evidence adduced during pretrial criminal proceedings, including con-

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[5] This is not a case where litigation was commenced or discovery was pressed simply to obtain information for publication. The lower court has held: "All of the evidence covered by the order compelling discovery was relevant to the plaintiffs' claims and the defense of those claims . . . ." (JA 132a.)

fessions introduced in open court at arraignment, other admissions by the defendant, the contents of a document obtained by the prosecutor, portions of the medical testimony at a preliminary hearing, and the names of certain victims. Although most of this information would not have been available but for the operation of the criminal justice system, the Court concluded that the right to disseminate it was protected by the First Amendment and that any order forbidding publication was "clearly invalid." 427 U.S. at 570.

Other decisions of this Court acknowledge that a state cannot constitutionally curb publication of news and other information merely because it originates in judicial proceedings. In *Smith v. Daily Mail,* 443 U.S. at 103, the Court held that even in "situations where the government itself provided or made possible press access to the information," a state cannot subject to criminal penalties the truthful publication of information from court records. Similarly, in *Oklahoma Publishing Co. v. District Court,* 430 U.S. at 311-12, the Court concluded that a state could not prohibit dissemination of the names of individuals that are disclosed during juvenile court hearings. Moreover, the Court implicitly acknowledged in *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978), that the First Amendment protects freedom of publication, even when the information derives from confidential preliminary proceedings that take place before the filing of any formal complaint.

Pretrial discovery is an integral part of the American judicial process, which involves the "common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575 (1980) (plurality opinion). The state may not evade this principle simply by characterizing civil litigation as a wholly private matter of no legitimate concern to the public. The boundaries between private lawsuits and public issues are not so easily drawn in our system of jurisprudence. As de Tocqueville observed, courts in the United States intervene in public affairs by chance, when private litigants seek the assistance of the judiciary to decide particular cases and controversies. *See* de Tocqueville at 89-93. *See also The Federalist* No. 51, at 324 (J. Madison) (H. Lodge ed. 1888)

("the private interest of every individual may be a sentinel over the public rights").

Moreover, because much of the information communicated in civil discovery is generally available in public court files,[6] a First Amendment interest in such information may be presumed:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of the government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records opened to public inspection.

Cox Broadcasting, 420 U.S. at 495. *See also Smith v. Daily Mail,* 443 U.S. at 102-04. *See generally* Note, *Rule 26(c) Protective Orders and the First Amendment,* 80 Colum. L. Rev. 1645, 1655-56 (1980).

D. The Fact That This Order Was Obtained In A Defamation Action Aggravates The Damage to First Amendment Values.

It is particularly disturbing that plaintiffs obtained the Protective Order in an action for defamation and invasion of

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[6] Much of the information covered by the Protective Order, including extensive data relating to plaintiffs' financial affairs, is available in the public files of this Court (CP 377-703), although, under the terms of the Protective Order, petitioners (but no one else) are forbidden to publish, disseminate, or "use" any of this material.

privacy, in which they seek a massive monetary judgment for past publications about their activities. Rhinehart sought entry of this order not to limit dissemination of any specific information or documents, as protective orders are often designed to do, but to prevent further public discussion about him and his group. By halting much of the newspaper commentary at the outset of the lawsuit in order to avoid subjecting Rhinehart to "any exposure which he deems offensive" (JA 110a), the Protective Order effectively grants plaintiffs extraordinary and unprecedented injunctive relief.

Plaintiffs' affidavits themselves reveal that they sought the Protective Order in order to prevent further newspaper commentary. For example, the Rhinehart affidavit declared:

> Since the writing and publishing of numerous articles the subject matter of this cause of action, the staff of the Aquarian Foundation, its members, and I have been subjected to numerous threats of violence in the form of telephone threats and personal appearances of unnamed individuals. These threats have occurred at both the Aquarian Foundation offices and my personal residence in Seattle, Washington.

(JA 40a-41a.) Avalos, in her affidavit, asserted that the incidents occurred "as a result of the Walla Walla Union-Bulletin and Seattle Times articles." (JA 43a.) The Dunn Affidavit also averred that the incidents arose as a direct result of the articles. (JA 45a-46a, 48a.) Similarly, Harold testified that the incidents "occurred after" publication of defendants' articles and "would not have occurred had the . . . articles not been published." (JA 83a, 92a.) It is clear that plaintiffs sought to eliminate further critical commentary by the Seattle Times about their activities.[7]

By relying upon the problems that resulted from the allegedly defamatory articles as the basis for their Protective

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[7] If plaintiffs had not managed to obtain this order as a result of their own lawsuit, which enabled them to invoke the broad language of Wash. CR 26(c), it is clear that the affidavits would be constitutionally insufficient to support the injunctive relief obtained. *See Near v. Minnesota*, 283 U.S. 697, 709 (1931) (prior restraint cannot be exercised to prevent publications tending "to disturb the peace of the community").

Order, plaintiffs have, in effect, obtained judicial assistance in enjoining a libel.[8] Such an exercise of judicial prerogative is inconsistent with the fundamental premises of a free society. As Justice Story long ago recognized:

> Courts of equity . . . have never assumed, at least, since the destruction of the Court of Star Chamber, to restrain any publication, which purports to be a literary work, upon the mere ground, that it is of a libellous character, and tends to the degradation or injury of the reputation or business of the plaintiff, who seeks relief against such publication. For, matters of this sort do not properly fall within the jurisdiction of Courts of Equity to redress; but are cognizable, in a civil or criminal suit, at law. . . .

2 J. Story, *Commentaries on Equity Jurisprudence* § 948a at 282 (4th ed. 1846). The issues dramatized in this case are similar to those faced during the early decades of the Republic, where libel actions were sometimes accompanied by a harsh exercise of "inherent" judicial power to punish "false, scandalous and malicious" publications during the pendency of the action. *See* J. Lofton, *Justice and the Press* 14-19 (1966); Z. Chafee, *Free Speech in the United States* 18-21 (1941); Nellis & King, *Contempt by Publication in the United States,* 28 Colum. L. Rev. 401, 401-15 (1928).

Recognizing that a defamation action inherently poses greater dangers to First Amendment values than other litigation, this Court has refashioned the elements of the cause of action itself in order to insure that "uninhibited, robust, and wide-open" debate upon public issues is not unnecessarily

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[8] Equity does not enjoin a libel. *See Kukatush Mining Corp. v. SEC,* 309 F.2d 647, 651 n.2 (D.C. Cir. 1962). The impact of the Protective Order is broader because it bars the publication of even presumably truthful information about Rhinehart and his group. Rhinehart's concern that dissemination of such material would somehow inhibit his flow of contributions, donations, and membership is misplaced. It is precisely such individual decision-making that the First Amendment encourages. *See Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 96-97 (1977). As Justice Brandeis has stated, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

throttled. *New York Times Co. v. Sullivan,* 376 U.S. at 270. In the *Sullivan* case, the Court drew upon the historical controversy over seditious libel, "which first crystallized a national awareness of the central meaning of the First Amendment," and devised new rules for defamation actions which would insure that the elements of common law defamation would not impose a "pall of fear and timidity . . . upon those who would give voice to public criticism." *Id.* at 273, 278. A defamation plaintiff's pretrial order aimed at halting, in the words of the Washington Supreme Court, "[u]nfavorable publicity" (JA 106a) results in a similar chilling effect upon speech protected by the First Amendment.[9]

The damage to First Amendment values caused by entry of the Protective Order is not limited to the "direct and immediate" impact, *Bernard v. Gulf Oil Co.,* 619 F.2d at 469, of outlawing constitutionally protected expression. The dangers of direct restraint on speech often include indirect "suppression of speech . . . by inducing excessive caution in the speaker." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973). As one court has noted, significant problems arise even where a gag order is limited only to information acquired during civil discovery:

> A judicial order restraining speech casts the judge in a role comparable to that of a censor. To escape the sanctions associated with violating the order, the speaker is inevitably led to clear his expression with the judge in advance and the speaker bears the burden of proving that the expression is inoffensive.

Halkin, 598 F.2d at 184 n.15. The result is, as plaintiffs perhaps intended, that newspaper coverage of their group is curtailed and the public is denied pertinent factual information.

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[9] To the extent that the Protective Order resembles the archetypical prior restraint, it does not merely "chill" speech but also "freezes" it. *See Nebraska Press,* 427 U.S. at 609 (quoting A. Bickel, *The Morality of Consent* 61 1975)).

In the peculiar context of defamation litigation, where the very subject at issue is the truth or falsity of published information already available to the general public, a pretrial restriction on publication is particularly offensive to First Amendment values. *See Marcus, Myth and Reality in Protective Order Litigation,* 69 Cornell L. Rev. 1, 65 (1983). Accordingly, lower courts have applied a particularly stringent analysis in weighing the justifications advanced for such orders. *See Reliance Insurance Co. v. Barron's,* 428 F. Supp 200 (S.D.N.Y. 1977); *New York Press Publishing Co. v. McGraw-Hill Publications Co.,* 64 A.D.2d 962, 409 N.Y.S.2d 39, 4 Med. L. Rptr. 1819 (1st Dept. 1978) *Georgia Gazette Publishing Co. v. Ramsey,* 248 Ga. 528, 284 S.E.2d 386 (1981) (applying state constitution).

E. "Unfavorable Publicity" Is the Essence of Freedom of Expression.

The First Amendment was designed to promote "freedom of expression in the political arena and the dialogue in ideas," despite the "risks to private rights from an unfettered press." *Nebraska Press,* 427 U.S. at 547. As Madison observed during the Constitutional debates, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates on the Federal Constitution* 571 (1876), *quoted in New York Times Co. v. Sullivan,* 376 U.S. at 271. Jefferson, writing in 1786, complained about press attacks:

> In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . .

9 *Papers of Thomas Jefferson* 239 (J. Boyd ed. 1954), *quoted in Nebraska Press,* 427 U.S. at 548. Thus, the "[u]nfavorable publicity" which the Washington Supreme Court viewed as one of the "harmful side effects" of civil litigation that requires

issuance of restrictive orders (JA 106a), is, in fact, the essence of free expression.[10]

The exercise of First Amendment freedoms is especially compelling in this case, in which a so-called "spiritualist church" seeks through the Protective Order to limit public discussion of its financial practices while it solicits funds from the public. In his *Notes on Virginia,* written in 1782, Jefferson commented upon the operations of religious groups where there is no established church:

> They flourish infinitely. Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order; or if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the State to be troubled with it. . . .

The Life and Selected Writings of Thomas Jefferson 276-77 (A. Koch & W. Peden eds. 1944).

If, as respondents claim, Rhinehart has the power to communicate with the dead, then surely the public has an interest in his activities. If he does not, or if (in Jefferson's words) his organization's "tenets would subvert morals," then "good sense" is hampered by restricting information critical to those issues. No doubt many considered the religious cult of Reverend Jim Jones simply an example of "the bizarre and the unorthodox" (JA 129a), but when the members of that group committed mass suicide on the orders of their leader, the public asked who those people were, why they joined that group, and what caused them to follow Jones with such blind devotion. To many, the answers to these questions provided valuable insights into contemporary American religious, cultural, and social

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[10] The Washington Supreme Court reasoned that dissemination of this information could be halted merely to remove all possibility of "annoyance, embarrassment and even oppression" from civil litigation (JA 131a). While that may be a laudatory goal, this Court has held that "[s]peech does not lose its protected character . . . simply because it may embarrass others . . ." or because it is "offensive." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-11 (1982). *See also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636 (1980) (expression cannot be prohibited because of alleged "undue annoyance").

values. The activities and the *bona fides* of controversial religious figures are matters of legitimate public interest and the information covered by the Protective Order entered below is important and should not be casually suppressed.

The Washington Supreme Court's decision, by permitting Rhinehart to obtain the Protective Order merely to avoid all "unwanted publicity" or to stop "any exposure which he deems offensive" (JA 128a, 110a), presents additional First Amendment dangers. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). To delegate such discretion to individual litigants without appropriate constitutional safeguards would effectively permit speech to be silenced solely "as a matter of personal predilections." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (quoting *Cohen v. California*, 403 U.S. at 21).

Such problems are aggravated in these particular circumstances. This Court has held that granting any religious group the power to curtail public "contempt, mockery, scorn and ridicule" is directly inconsistent with dictates of the First Amendment:

> [F]rom the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952) (footnote omitted). *Cf. Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982) (state cannot delegate zoning decisions to churches).

F. Civil Discovery Is a Presumptively Public Process.

Publicity is not, as the Washington Supreme Court assumed, a "cloud" (JA 128a) upon the integrity of pretrial

procedure. Despite the court's assertions that civil discovery "did not come into its full flower" until recent years (JA 105a) and that any public dissemination of information learned in discovery is *per se* illegitimate, compulsory pretrial disclosure between the parties is an ancient and traditionally public process. The proceedings that developed into our modern discovery procedures were, in fact, enmeshed in the public pleadings. *See* W. Glaser, *Pretrial Discovery and the Adversary System* 15-25 (1968). Even today, the complaint and answer, depositions, and responses to interrogatories, requests for admission, and requests for production are generally found in the public files.

Both common law and equity relied upon detailed pleadings as the primary basis for discovery. According to one observer:

> Written pleadings formed the traditional basis of preparation for trial in courts of common law. The chief objective of common law pleading was the production of a single issue which might be tried by the jury. The facts of the controversy were supposed to be narrowed down to a single issue from the respective allegations of the parties . . . As has been said, "refinements of pleading grew up on the court's passive willingness to let issues emerge out of the allegations recited to it by contending pleaders in antiphonal rivalry, and the stilted form which written pleading eventually assumed was born of the tradition of care with which every statement in one's opponent's pleading had to be met to the court's satisfaction without disclosing to that opponent too much of one's own case."

G. Ragland, *Discovery Before Trial* 1-2 (1932) (footnote omitted). Equity made several explicit discovery devices available, Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 Ill. L. Rev. 424, 441 (1937); R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 204 (1952), but, as in the common law courts, civil discovery emerged in the interstices of the pleading process:

> Pleadings and discovery proper were commingled in equity pleadings. The result was that pleading in equity assumed the form of a detailed statement of the party's evidence.

Ragland at 15. *See generally Developments in the Law-Discovery,* 74 Harv. L. Rev. 940 (1961). The pleadings were composed of sworn interrogatories, J. Story, *Commentaries on Equity Pleadings* § 35 (7th ed. 1865), and the pleading process was the equivalent of the modern trial.[11]

The historical antecedents of modern discovery practice were documents that were generally available for public inspection and review. *See Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 602 (1978) (recognizing common-law presumption of public access); *Ex parte Uppercu,* 239 U.S. 435, 439-41 (1915) (recognizing common law right). Modern discovery practice has changed nothing in this tradition of openness merely by simplifying the procedures, clarifying the scope, and moving much of pretrial case management from the pleading process to various discovery devices.[12] As this Court

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[11] In equity, suits were ultimately resolved on the basis of sworn affidavits and pleadings and "[n]o formal trial with witnesses was ordinarily had," C. Clark, *Handbook of the Law of Code Pleading* § 5 at 16 (2d ed. 1947). The contents of the court file constituted the functional equivalent of the trial. *See* F. James & G. Hazard, *Civil Procedure* § 6.1 (2d ed. 1977). Thus, there was no formal dichotomy between discovery and trial. Pretrial discovery procedure developed the written record of testimony upon which the Chancellor could render a verdict. *See* Goldstein, *A Short History of Discovery,* 10 Anglo-Am. L. Rev. 257, 259 (1981). *See generally* James, *Discovery,* 38 Yale L.J. 746 (1929).

[12] As the Court noted in *Hickman v. Taylor,* 329 U.S. 495, 507 (1947), the Federal Rules of Civil Procedure altered the federal discovery process by enabling a litigant to seek information relevant to his opponent's case as well as his own. Another innovation was the addition of the deposition to the arsenal of discovery devices. *See* P. Dyer-Smith, *Federal Examinations Before Trial and Depositions Practice at Home and Abroad* §§ 18, 57 (1939); Pike & Willis, *The New Federal Deposition-Discovery Procedure,* 38 Colum. L. Rev. 1179, 1436 (1938). It is difficult to understand how such minor improvements, significant though they may be in increasing the efficiency of the discovery process, could be the basis for suddenly establishing a contrary presumption, namely, that publication would thenceforth be *per se* wrongful. Governmental efficiency may not be pursued at the expense of constitutional protections. *See Stanley v. Illinois,* 405 U.S. 645, 656-57 (1972).

has noted, a basic presumption of openness is significant in constitutional terms "not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment)).[13]

Contrary to the Washington Supreme Court's assertion that modern discovery practice suddenly opened "[a] realm of privacy which courts had previously left undisturbed" (JA 110a), the traditional bill of discovery inquired into private matters, which thereby became public. Indeed, any information equally available to both parties, such as public records, was not a proper subject for a bill of discovery. *See, e.g., Baker v. Biddle*, 2 F. Cas. 439, 450 (C.C.E.D. Pa. 1831) (No. 764).

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[13] Although much of petitioners' historical analysis concentrates on public rights of access to pretrial discovery materials, the instant case is more narrowly framed. In this case, because petitioners have been granted access under Wash. CR 26(b)(1), the right of access is not at issue. *See Smith v. Daily Mail*, 443 U.S. at 105-06. Because the question posed is purely the freedom of publication where newsworthy information has been lawfully obtained, this Court need not reach the issue of whether there exists a general First Amendment right of public access to pretrial discovery information. *See, e.g., In re San Juan Star Co.*, 662 F.2d 108, 113-116 (1st Cir. 1981) (holding that third parties have First Amendment right of access to transcripts of pretrial depositions); *Times Newspapers Ltd. (of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 194-96 (C.D. Cal. 1974) (holding that First Amendment conferred no right for third parties to attend depositions). *See also CBS, Inc. v. Young*, 522 F.2d at 237-38 (holding that non-party has standing to challenge protective order); *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983) (holding that non-party lacks standing to challenge protective order). *See generally* Marcus at 11-13 (noting practical problems in permitting actual public attendance at depositions); Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1104-05 (1981) (criticizing limitations on access without due regard for public rights); Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 New Eng. L. Rev. 1, 10-17 (1978) (distinguishing access and publication). This Court has generally observed that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

In an early case, the court held that the right to compel production of documents was unavailable where the information was in the public records. *Geyger's Lessee v. Geyger*, 2 Dall. 332, 333 (C.C.D. Pa. 1795). *See Brown v. Swann*, 35 U.S. (10 Pet.) 497, 501-02 (1836). *See also* P. Dyer-Smith, *Federal Examinations Before Trial and Depositions Practice at Home and Abroad* 54 n.75 (1939); N. Fetter, *Handbook of Equity Jurisprudence* 320 n.6 (1895). Although modern pleading and procedural reforms have altered the manner in which litigants obtain pretrial information, formal discovery is still only one element of a public process for narrowing and refining civil controversies.[14]

The scope of discovery has always been much broader than that governing the evidence introduced at trial (JA 116a-117a). As Justice Washington noted in 1818, the question is simply whether the information sought is pertinent to the issue. *Bas v. Steele*, 2 F. Cas. 988, 990 (C.C.D. Pa. 1818) (No. 1088). Equity might refuse to enforce discovery where it was "*remote in its bearings* upon the real point in issue" or would be "impertinent." J. Wigram, *Points In The Law of Discovery* 166, 168-71 (1st Am. ed. 1842) (emphasis in original). But, according to one commentator:

> To resist discovery on this ground, the charge must be so plainly immaterial, or . . . so obviously

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[14] Only with the advent of modern notice pleading was discovery formally separated from the pleadings. In fact, by removing evidentiary facts from the pleading process, pleading reforms made modern discovery procedures necessary. "Detailed pleading does, of course, tend to define the controversy more narrowly and give fuller notice to the adversary than does more general pleading." James & Hazard at 61-62. Pretrial discovery has now replaced the pleadings as the principal means for delineating and narrowing the issues and contentions of the parties. *Id.* at 57; Pike & Willis at 1179-80. According to one observer, because it is difficult "to determine just where to draw the distinction between facts, law, and evidence," modern liberal discovery is "a necessary complement of simplified pleading." Ragland at 261. *See also* Clark at § 89. Thus, discovery is still only one part of the pretrial process for narrowing the legal issues and factual disputes between the parties. *See, e.g., Schoen v. Washington Post*, 246 F.2d 670, 672 n.4 (D.C. Cir. 1957) (defects in libel complaint may be corrected by use of bill of particulars or by discovery). *See also* Wash. CR 12(e) (West 1983) (motion for more definite statement).

> frivolous, that no state of the case can be supposed in which the answer could be made available. In general, if it can be supposed that the discovery may in any way be material to the plaintiff, the defendant will be compelled to make it.

T. Hare, *A Treatise on Discovery of Evidence* 161 (1st Am. ed. 1836) (footnotes omitted). Equity required only that the information sought be "reasonably material" to the case at issue. W. Kerr, *A Treatise on the Law of Discovery* 163 (1870). Where information "may be directly or indirectly material for arriving at a decision, the discovery is material and must be given," and, therefore, "[a] certain latitude must, therefore, always be allowed." *Id.* at 161, 162.

Protective orders evolved as a means for limiting the scope of discovery. They were not employed for the purpose of limiting dissemination, publication, or use of the information so obtained. If information was material or relevant to a civil action, it was properly discoverable and, therefore, became part of the public records. Justice Story was emphatic that, although discovery bills should not include "scandalous and impertinent matter," any exercise of judicial authority to "expunge"[15] such materials was carefully circumscribed:

> [I]n cases of mere impertinence, the court will not . . . order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is erroneously struck out, the error is irremediable; but if it is not struck out, the court may set the matter right in point of costs.

Story, *Commentaries on Equity Pleadings* at § 267 (footnotes omitted). Any momentary embarrassment created by information in the public files was properly controlled by other, less intrusive, devices:

> It was to prevent these glaring faults of scandal and impertinence, alike mischievous and oppressive,

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[15] Because civil discovery developed as an element of equity pleading, the motion to strike is the true ancestor of the protective order in this case. Today Wash. CR 12(f), like its federal counterpart, permits the court in limited circumstances to "order stricken from any pleading . . . any redundant, immaterial, impertinent or scandalous matter."

> (which might make the records of the courts the vehicles of slander or idle gossip,) that courts of equity, at a very early period, required all bills to have the signature of counsel affixed to them; and if no such signature appears, or the signature is not genuine, the bill will be dismissed, or ordered to be taken off the files of the court. . . . *But nothing, which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous.*

Id. at § 269 (footnotes omitted) (emphasis added). Likewise, an answer to a bill in equity that contained relevant matter could not be deemed scandalous and, thus, could not properly be expunged by order of court. *Id. at § 862.*

Depositions, though traditionally a device for perpetuating trial testimony, were treated like other public documents.[16] In *United States v. Tilden,* 28 F. Cas. 169, 170 (S.D.N.Y. 1878) (No. 16,520), the defendant opposed the plaintiffs' motion to have certain depositions opened and filed, claiming that there existed "a policy that depositions de bene esse . . . are not intended to be published or opened, unless by consent, until the trial" in order to permit "irrelevant and scandalous matter . . . [to] be supressed and excluded." The court, however, recognized a consistent policy of openness:

> While it is possible that in some cases the power to take testimony may be abused for the purpose of

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[16] In its discussion the Washington Supreme Court assumed that depositions are the only discovery process covered by the Protective Order. In attempting to distinguish a Florida decision which had denied a motion to exclude the press and public from *discovery* proceedings, the court simply observed that, although under Florida law *depositions* are generally open to the public, "[t]hat is not the case in this state." (JA 118a.) The basic presumption of public access cannot be dismissed so casually. Washington's Civil Rules, like their federal counterparts, provide for several alternative and cumulative discovery methods. The state rules also provide that "[a]ll pleadings and other papers" are to be filed with the court, Wash. CR 5(d)(1), and specific rules in King County, where Rhinehart's lawsuit was filed, require that answers to interrogatories, responses to requests for production of documents, and answers to requests for admissions be filed with the court. *See* LR 33(a)(3), 34(b)(2), 36(a)(2), Local Rules of the Superior Court for King County (West 1983).

> publishing scandalous and irrelevant matter, yet on the other hand the power of either party to forbid the opening of the depositions until the trial may lead to abuses much worse, and to surprise and failure of justice on the trial.

Id. at 171. The court in *Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601, 604 (2d Cir. 1922), followed this ruling, concluding that "there was not the slightest reason why the deposition should not . . . become accessible to the litigants, and for that matter to the public." *Id.* at 604.

The rarity of such orders argues persuasively that pretrial civil proceedings are presumptively matters of public interest. Even before 1925, when this Court held in *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925), that the First Amendment applied to the states through the Fourteenth Amendment, state courts rarely issued such restrictive orders.[17] Moreover, they were issued only in certain special types of litigation, such as

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[17] For example, in 1893 a newspaper reporter was denied access to "the painful, and sometimes disgusting, details of a divorce case" because the court concluded that such information should not be made available merely "to gratify private spite or promote public scandal." *In re Caswell*, 18 R.I. 835, 836, 29 Atl. 259, 259 (1893). Similarly, in 1917, a defendant was denied copies of certain letters and depositions that had been sealed by consent at the conclusion of her divorce case. She had hoped to use the information to prevent the admittance of her former husband's new wife to a private club. *See King v. King*, 25 Wyo. 275, 168 Pac. 730 (1917). A series of Michigan cases held that pleadings are not really public records. *See Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896); *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891). These rulings, however, appear to have been premised upon the notion that only the parties to a lawsuit may publish or disseminate the contents of pleadings. It appears that even the Michigan courts would not have sanctioned such an order against a party. *See Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888). According to Holmes, the judicial authority to limit dissemination of pretrial proceedings derived from English Chancery practice, which treated any publication about matters that were *sub judice* as a contempt of court. *Cowley v. Pulsifer*, 137 Mass. 392, 396 (1884). *See, e.g.*, 8 Halsbury, *The Laws of England* 9-12 (3d ed. 1954). *See generally* Goodhart, *Newspapers and Contempt of Court in English Law*, 48 Harv. L. Rev. 885, 895-906 (1935). In the 1940s, this Court held that such broad judicial authority was repugnant to the mandate of the First Amendment. *See Craig v. Harney*, 331 U.S. 367 (1947).

divorce proceedings.[18] Even with the development of liberalized pleading and discovery procedures, federal courts continue to recognize a similar presumption that "discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (per curiam), *cert. denied sub nom. American Tel. & Tel. Co. v. MCI Communications Corp.*, 440 U.S. 971 (1979). *See also Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979); *Davis v. Romney*, 55 F.R.D. 337, 340 (E.D. Pa. 1972); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969). In 1963, even while it expressed "no doubt" about the constitutionality of a properly drawn protective order, the Second Circuit held that the First Amendment limited judicial discretion in issuing protective orders. *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963).

In 1979 the *Halkin* opinion drew upon this broad historical background, when it recognized a basic First Amendment interest in disseminating discovery materials. The court held that a protective order restraining litigants "from communicating matters of public importance for an indefinite period of time . . . constitutes direct governmental action limiting speech

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[18] In tolerating certain limitations on pretrial publicity of information learned in discovery, the courts in the 1920s and 1930s were apparently concerned with the excesses of tabloid journalism in reporting the details of divorce proceedings. *See* Ragland at 30-31, 91. The Minnesota statute that led to the seminal prior restraint decision, *Near v. Minnesota*, was enacted for almost identical reasons. One historian has described how *Near* arose out of the tabloid journalism that flourished in the 1920s and offended the legal community with "the graphic details of the tabloid's portrayals of scandals and divorces of rich or prominent people." Murphy, *Near v. Minnesota in the Context of Historical Developments*, 66 Minn. L. Rev. 95, 134 (1981). *See also* F. Friendly, *Minnesota Rag* (1981). As in *Near*, however, such concerns do not justify compromising well-established principles governing prior restraints and similar orders.

and must be carefully scrutinized in light of the First Amendment." *Halkin*, 598 F.2d at 183. Recognizing that a pretrial order prohibiting publication of newsworthy information posed "many of the dangers of a prior restraint," *id.* at 186, the court proposed a two-step analysis. A trial court must first establish whether a particular protective order in fact restrains expression and the nature of that restraint. Second,

> [t]he court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

Id. at 191 (footnotes omitted). In the aftermath of *Halkin* a number of courts have recognized substantial First Amendment problems arising from the unrestrained use of pretrial protective orders.[19]

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[19] In concluding that no First Amendment standards are necessary, the Washington Supreme Court has rejected the overwhelming weight of authority. *See, e.g., Doe v. District of Columbia*, 697 F.2d 1115, 1118-21 (D.C. Cir. 1983) (reaffirming *Halkin* test); *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1982) (applying presumption of openness); *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir. 1982), *cert. denied sub nom., Attorney General of Ohio v. Krause*, 103 S. Ct. 54, 74 L. Ed. 2d 59 (1982) (applying *Halkin* test); *In re Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation*, 664 F.2d 114, 118 n. 1 (6th Cir. 1981) (reserving *Halkin* issues); *San Juan Star*, 662 F.2d at 116 (adopting "heightened sensitivity" First Amendment access test); *United States v. General Motors Corp.*, No. 83-2220 (D.D.C., filed Oct. 19, 1983) (applying *Halkin*); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 475-82 (S.D.N.Y. 1982) (recognizing First Amendment interests at stake); *Zenith Radio Corp. v. Matsushita Elec. Indust. Co.*, 529 F. Supp. 866, 909 (E.D. Pa. 1981) (adopting *San Juan Star* formula); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (applying *Halkin* test); *Tavoulareas v. Piro*, 93 F.R.D. 24, 30 n.4 (D.D.C. 1981) (acknowledging flexibility in *Halkin* test); *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 425-27 (W.D.N.Y. 1981) (approving *Halkin*); *Brink v. DaLesio*, 82 F.R.D. 664, 676-78 (D. Md. 1979) (applying *Halkin*). State courts have also considered the First Amendment problems caused by routine issuance of such orders. *See Farnum v. G.D. Searle & Co.*, No. 303/68882 (Iowa, filed Oct. 19, 1983) (applying *Halkin*); *Montana Human Rights Div'n v. City of*

(footnote continues)

II.

SPECULATIVE CONCERNS UNSUPPORTED BY FINDINGS ARE INSUFFICIENT TO JUSTIFY A CURB ON FIRST AMENDMENT RIGHTS

A. Generalized Interests Cannot Support a Prohibition on Free Expression.

This Court has recognized that "the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government," and, therefore, that the judiciary must possess the authority to control "conduct [that] tends directly to prevent the discharge of their functions." *Wood v. Georgia*, 370 U.S. 375, 383 (1962). Even where the administration of justice is involved, however, the state must advance a "compelling governmental interest" to support any infringement of First Amendment freedoms and must also demonstrate that the infringement "is narrowly tailored to serve that interest." *Globe Newspaper*, 457 U.S. at 607. Invoking the generalized "interest of the judiciary in the integrity of its discovery processes" (JA 130a) does not satisfy that showing.

When a state seeks to curtail speech because it allegedly threatens the administration of justice, this Court has repeatedly held that " 'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,' " *Landmark Communications*, 435 U.S. at 835 (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)), that a " 'solidity of evidence' . . . is necessary to make the requisite showing of imminence," *id.* (quoting *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946)), and that " '[t]he danger must not be remote or even probable; it must immediately imperil,' " *id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)). *See also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th

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(footnote continued)

Billings, 649 P.2d 1283, 1290 (Mont. 1982) (applying *Halkin*); *Kuiper v. District Court*, 632 P.2d 694, 697-98 (Mont. 1981) (applying *Halkin*). *But see Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982) (rejecting First Amendment test). *Cf. State ex rel. Bilder v. Township of Delavan*, 112 Wisc. 2d 539, 334 N.W.2d 252 (1983) (noting First Amendment issue but refusing closure on statutory grounds).

Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *Chase v. Hobson*, 435 F.2d 1059, 1061 (7th Cir. 1970). As the Court stated in *Pennekamp v. Florida*, 328 U.S. at 347, "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

In *Craig v. Harney*, 331 U.S. at 378, the Court held that the First Amendment prohibited courts from punishing news and editorial comment about pending civil litigation where the record failed to reflect a "substantial showing" that the specific publications would "create an imminent and serious threat" to the administration of justice. The Court stated:

> There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Id. at 374. As in this case, the government suggested that First Amendment interests are not significant where publications related merely to private civil litigation. The Court rejected this suggestion. *Id.* at 378.

The state unsuccessfully advanced generalized arguments about "the pernicious effects of public discussion" to support pretrial confidentiality in *Landmark Communications*, 435 U.S. at 840, where the Court held that a newspaper publisher could not be criminally punished for accurately reporting confidential proceedings of a state commission on judicial misconduct. As in the instant case, the state asserted that premature disclosure of any information before the commission had completed its initial fact-finding process would undermine "confidence in the judicial system," create unnecessary "adverse publicity," and hamper the "willing participation of relevant witnesses." *Id.* at 833, 835. The Court reversed, holding that neither the state's interest "in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts," was a sufficient basis for imposing criminal punishment upon expression, where the state offers "little more than assertion and conjecture to support its claim." *Id.* at 841.

Although, as the Washington Supreme Court noted (JA 125a-126a), the context of this Protective Order differs from the situation in *Landmark* because it was obtained against a litigant (albeit a reluctant one), the state's interest in promoting "confidence in the judicial system" is no stronger merely because it intrudes upon one litigant's freedom of expression at the behest of another. "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). First Amendment freedoms are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Abstract concepts, such as the "integrity" of the judicial system, cannot by themselves support the drastic curb upon expression effected by the Protective Order.

B. The State's Justification for Curtailing Expression Must be Articulated in Specific Findings.

This Court's decisions dispel any notion that government may curtail freedom of expression for unexplained and speculative reasons. Rather, where vital First Amendment interests are at stake, the state must offer "an overriding interest *articulated in findings*" before it may constitutionally limit the First Amendment rights inherent in the open administration of justice. *Globe Newspaper*, 457 U.S. at 608 n.20 (quoting *Richmond Newspapers*, 448 U.S. at 581). Where the trial court stated merely that a failure to issue a protective order in some situations "could have a chilling effect on a party's willingness to bring his case to court" (JA 54a) and the Washington Supreme Court concluded only that "that parties generally are not eager to divulge information about their private affairs" (JA 128a), the state has not offered any findings which will support a restraint upon expression.[20]

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[20] Such findings are mandated by the First Amendment because it is "of prime importance that no constitutional freedom . . . be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). As this Court has observed, "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. at 429.

The Washington Supreme Court candidly admitted that the effect of denying a protective order and permitting expression in this particular case would be merely "a matter of speculation." (JA 128a.) Such reasoning falls far short of the showing made in *Nebraska Press*, 427 U.S. at 562-63, where this Court refused to permit entry of a restraint upon publication despite the trial court's "justified" finding that a sensational murder trial "would" generate "intense and pervasive pretrial publicity" which "might impair the defendant's right to a fair trial," in part because, on the record before it, such a conclusion was "of necessity speculative." The Court stated:

> Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here is not demonstrated with the degree of certainty our cases on prior restraint require.

Id. at 569. If the specific finding of an adverse impact of pretrial publicity upon a particular criminal defendant's Sixth Amendment rights was insufficient to justify a prior restraint in *Nebraska Press*, the wholly conjectural justification advanced in this proceeding is even less supportable.[21]

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), this Court was faced with a "sweeping restraint order" that prohibited communications from named plaintiffs and their counsel to prospective class members during the pendency of a class action. Avoiding the First Amendment issue, the court nonetheless held that any such order "should be based on a clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." *Id.* at 101. Furthermore, the Court stated, "the mere possibility of abuses [in class action litigation] does not

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[21] A comparison of the instant case with *Nebraska Press* is instructive in other respects. The state sought to justify the restraint on publication in *Nebraska Press* as a means of protecting the Sixth Amendment rights of a criminal defendant. The Fifth Circuit, in *Bernard v. Gulf Oil Co.*, 619 F.2d at 474, held a similar civil order unconstitutional, noting that "[i]f exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior restraints, the interests of a civil litigant cannot do so."

justify routine adoption of a communications ban." *Id.* at 104. The Court went out of its way to comment upon the First Amendment concerns:

> We conclude that the imposition of the order was an abuse of discretion. The record reveals no grounds on which the District Court could have determined that it was necessary or appropriate to impose this order. Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at a minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether restraint is justified by a likelihood of serious abuses.

Id. at 103-04 (footnote omitted).

Nothing in the record supports a finding that the Protective Order is justified by a likelihood of serious abuses by the Seattle Times. Rather, the courts below simply embraced a *per se* rule that information which emerges in discovery should not be disseminated beyond the limited bounds absolutely necessary to prepare for trial. Before restricting or punishing expression, a court must "make inquiry into the imminence and magnitude of the danger . . . and then . . . balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications*, 435 U.S. at 843. Naked speculation about the impact of adverse publicity upon "parties generally" (JA 128a) is no substitute for the rigorous findings required by the decisions of this Court and by the First Amendment.[22]

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[22] The court below also speculated that closed proceedings may limit the possibility of perjury (JA 128a). This Court has held to the contrary, noting that public scrutiny "enhances the quality and safeguards the integrity of the factfinding process." *Globe Newspaper*, 457 U.S. at 606. *See also Cox Broadcasting*, 420 U.S. at 492 (acknowledging "the beneficial effects of public scrutiny upon the administration of justice"); 1 J. Bentham, *Rationale of Judicial Evidence* 522-23 (1827) (publicity of deposition "operates as a check upon mendacity and incorrectness").

Nor is administrative convenience a sufficient basis for curbing expression. Even in complex litigation, appropriate procedures are available to facilitate pretrial discovery while protecting the parties' First Amendment interests. *See Halkin*, 598 F.2d at 196 n.47. Moreover, Washington Civil Rule 26(c), which is identical to its federal counterpart, requires that good cause be shown prior to the issuance of any pretrial protective order. Wholly aside from the constitutional requirements, the proponent of such an order must satisfy the burden of offering "a particular and specific demonstration of fact." *Gulf Oil Co. v. Bernard*, 452 U.S. at 102 n.16. *See also General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975). The recognition of a constitutional floor beneath this well-established framework will not alter the structure of civil litigation.

III.

THIS COURT SHOULD APPLY A TEST THAT WILL RECOGNIZE THE FIRST AMENDMENT INTEREST IN DISSEMINATION AND THE LIMITED GOVERNMENTAL INTEREST IN PROTECTIVE ORDERS

A. Where a Protective Order Will Restrict First Amendment Interests, the Court Should Closely Scrutinize the Justification.

The Washington Supreme Court sought to justify a broad restraint upon publication but failed to make the careful analysis required by the First Amendment and by prior decisions of this Court before any state may consitutionally impose such restrictions. Of course, not every protective order issued under Civil Rule 26(c) or its state and federal counterparts will trigger First Amendment concerns. Changing the time or place of a deposition or monitoring the sequence of discovery will not, for example, require that the court engage in any First Amendment analysis. On the other hand, where a defamation action is the vehicle for a direct restraint on expression, the

court should be particularly sensitive to First Amendment concerns and closely scrutinize the justifications advanced.

B. The Court Should Carefully Examine the Harm Dissemination Will Allegedly Pose.

A court should not issue a protective order that prohibits freedom of expression except for the most compelling of reasons. As Justice Brandeis observed in *Whitney v. California,* 274 U.S. at 377 (Brandeis, J., concurring): "Prohibition of free speech . . . is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society." The state's justification must be a "weighty one" and the order must be "necessitated by a compelling governmental interest" established on a case-by-case basis, *Globe Newspaper,* 457 U.S. at 606-07. As in *Nebraska Press,* 427 U.S. at 562 (quoting *United States v. Dennis,* 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.), *aff'd,* 341 U.S. 494 (1951)), the court must determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The First Amendment requires a careful analysis of the competing interests at stake before issuance of any judicial order which restrains expression.

A court must recognize that expression has a capacity to inform and enlighten the public. To begin with any other assumption is to succumb to the undemocratic premise that "speech is an abnormally dangerous social force" that requires constant regulation. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage,* 66 Minn. L. Rev. 11, 92 (1981). As this Court has noted in striking down state efforts to regulate and limit the exercise of commercial speech:

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But, the choice among these alternative approaches is not ours to

> make. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 770. Pretrial discovery advances interests identical to those served by the First Amendment. Both are designed to promote public information, education, and knowledge. To the extent that the Washington Supreme Court perceived an inherent conflict, its conclusion is incorrect. Litigants do not, either by filing or by being drawn into a lawsuit, suddenly become wards of the state.

In examining the justification advanced to support entry of a protective order, the court should focus on the specific interests at stake in each case and then determine how each document or item of information will cause concrete harm. *See, e.g., United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981). A protective order should not be employed as a rubber stamp, conferring a judicial blessing upon the abuses of excessive discovery. Generalized assertions about potential "annoyance" or "embarrassment" do not by themselves justify any limitation upon free expression. *See NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 910-11 (1982). Furthermore, the court should be careful not to confuse constitutional rights of privacy (such as marriage or procreation) with other less significant interests stemming from tort law. Concerns about privacy that are not rooted in the Constitution should generally yield to the public interest served by the discovery process.[23]

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[23] The Washington Supreme Court's heavy reliance upon general privacy concerns stemming from tort law (JA 111a-117a) is misplaced. *See Paul v. Davis*, 424 U.S. 693, 701-13 (1976) (distinguishing privacy tort from constitutional right of privacy). The Constitution does not encompass a general right to prevent nondisclosure of private information. *J.P. v. DeSanti*, 653 F.2d 1080, 1087-91 (6th Cir. 1981). Generalized concerns for privacy are not by themselves enough to mandate the issuance of an order banning freedom of expression. See, *e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. at 909-11; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Rather than assume that protective orders are matters of routine, the court should avoid restricting expression except in the clearest instances. As Justice Holmes noted in *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the expression must "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." Moreover, a mere "[f]ear of serious injury cannot alone" justify restrictions upon expression. *Whitney v. California,* 274 U.S. at 376 (Brandeis, J., concurring). Only after the court adequately weighs all the interests and concludes that the harm posed by dissemination of specific documents is so substantial and serious that the denial of such an order would immediately imperil a compelling state interest should it issue such an order. *See Landmark Communications,* 435 U.S. at 842-43. The mere possibility of abuse is not enough. *Gulf Oil Co. v. Bernard,* 452 U.S. at 104. Speculation and conjecture are equally insufficient.

C. The Court Should Determine That The Order Will Be Effectual.

Moreover, the court should also determine "how effectively a restraining order would operate to prevent the threatened danger." *Nebraska Press,* 427 U.S. at 562. Where the information sought to be restrained is likely to be introduced at time of trial or on summary judgment, a court should hesitate to halt publication simply to permit one litigant, for tactical reasons, to control the timing and manner of disclosure. Similarly, a protective order that forbids a party to disseminate information already contained in public records (which is the case here) not only fails to satisfy the constitutional requirements of *Cox Broadcasting* but also is ineffectual where other members of the public could have access to the same information.

D. The Court Should Ensure That Any Restraining Order Is Narrowly Drawn And Precise.

The state has a legitimate interest in preventing abuses of the discovery process but, as in other situations, it must pursue

its goals "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *NAACP v. Button,* 371 U.S. at 438. *See also In re Primus,* 436 U.S. at 426, 438. In the context of expression, a state must always regulate with great precision.

Any limitation upon the public administration of justice must be "narrowly tailored to serve a specific, compelling governmental interest." *Globe Newspaper,* 457 U.S. at 607. Such a requirement is particularly important in these circumstances, where the Protective Order directly forbids publication. When restraints upon expression are involved, the Court has specified that the restraint "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate." *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175, 183 (1968). The duration of the order must be limited and its language precise.[24]

E. The Court Should Find That There Are No Alternatives Which Intrude Less Directly On Expression.

Many problems often addressed by protective orders are easily resolved by other, less intrusive, means. In *Nebraska*

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[24] Restrictions on information must be carefully confined to only that which is absolutely necessary to protect the interest at stake. For example, the court issued its Protective Order covering broad categories of information—such as plaintiffs' "financial affairs" (JA 65a)—without any prior review of the materials covered. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559-62 (1975) (procedural safeguards required). The Washington Supreme Court also acknowledged that the Protective Order is of indefinite duration and, by its terms, applies to information revealed in open court. The court noted that such matters might be clarified on remand but offered no further guidance (JA 131a n. 9). Through its opinion, moreover, the court also implied (JA 148a-149a) that the Protective Order precludes the newspapers from publishing *any* information which emerges in discovery. Even where the right of non-party access was the only issue and no ban on publication was involved, the First Circuit, in *San Juan Star,* 662 F.2d at 116-17, emphasized that the protective order was narrowly drawn and of limited scope and duration.

Press, 427 U.S. at 562, the Court examined "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity" during a criminal case. A similar analysis should be required in the civil setting. *See, e.g., Gulf Oil Co. v. Bernard*, 452 U.S. at 104. In some cases, for example, a court may simply trust the discretion of the newspaper to publish appropriate newsworthy information. *Smith v. Daily Mail*, 443 U.S. at 105 n. 3.

Another available option is for the court to supervise and control the discovery process more closely. Because many of the dangers feared in civil litigation stem largely from a judicial reluctance to monitor the scope of discovery, many abuses addressed by protective orders could be more effectively handled through effective case management, though it may be "a dull, time consuming affair." Liman, *The Quantum of Discovery v. The Quality of Justice: More Is Less*, 4 Litigation, Fall 1977, at 8, 8. Where material that is not relevant to the lawsuit is at issue, the court can simply draft an order which limits the scope of discovery. Judicial rules permit the court to exercise broad powers of supervision over the mechanics of the discovery process; they do not create a license for broad judicial interference with expression. [25]

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[25] Protective orders have served as a convenient pretrial tool. Until recent months, the federal courts had few mechanisms for curbing discovery abuse, especially where excessive discovery was the problem. Routine issuance of protective orders often reflected judicial abdication by masking, and thus facilitating, the abuses of excessive discovery. Rules 11, 16 and 26(b)(1), Fed. R. Civ. P., now grant the federal courts greater authority for effectively supervising and monitoring discovery abuse. *See generally* Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 Judicature 363 (1983). Increasingly, courts have come to recognize that "the judiciary's use of effective case and court management techniques can help speed the termination of civil actions without impairing the quality of justice." P. Connolly, E. Holleman & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 3 (Federal Judicial Center 1978). Older notions that discovery was simply a matter for the attorneys, with the court serving only as a passive umpire, have now been supplanted by a judicial recognition "that the trial judge must actively supervise each stage of the case to minimize delay." *Id.* at 14. By requiring "a careful weighing of competing factors," the Court's decision in *Gulf Oil Co. v. Bernard*, 452 U.S. at 102, implicitly acknowledged that such passive case management would no longer suffice.

In most cases, injunctive remedies are not the only solution. For example, if false information is published or if an unreasonable invasion of privacy occurs, the victim will have available an action for damages. *See Restatement (Second) of Torts* §§ 623A, 652A (1977). In these ways, the law of damages operates as a check upon harmful publication of any information. A court should be reluctant to add additional, injunctive remedies when none are needed.

Furthermore, where a litigant simply fears potential trouble from third parties as a result of possible dissemination, the court can focus upon conduct by those third parties and the remedies available to curb or punish that conduct. Thus, plaintiffs' generalized fears about discrimination in employment as a result of disclosures (JA 45a) are quickly resolved by legal remedies precisely tailored for discrimination on the basis of religious belief. *See* 42 U.S.C. § 2000e-2 (1976) (federal antidiscrimination law); Wash. Rev. Code § 49.60.180 (1981) (state antidiscrimination law). Other measures might include restraining orders against the offending conduct (JA 85a-87a) rather than a prophylactic regulation of newsworthy discussion. *See also* 42 U.S.C. § 1985 (deprivations of civil rights); Wash. Rev. Code § 9A.36.080 ("malicious harassment" because of victim's religion). Finally, local police are always available to handle any threats or incidents of violence.

A protective order is a convenient device because it can promote effective case management and limit the possibility of pretrial abuses. A protective order, however, cannot eliminate every possibility of embarrassment or annoyance caused by civil litigation. It is not an all-purpose bill of peace. In many cases, therefore, a court may simply have to accept the fact that some embarrassment and annoyance may be an unavoidable consequence of free expression. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. at 910. In the absence of a specific showing that the harm posed by dissemination is substantial and serious, that the order would be effective and would limit publication only to the extent that it is absolutely necessary, and that there are no alternative remedies to protect the compelling state interest, the Protective Order cannot survive.

CONCLUSION

The opinion and judgment of the Supreme Court of the State of Washington in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982), should be vacated and the cause remanded for further proceedings in accordance with this Court's opinion.

DATED November 16, 1983.

Respectfully submitted,

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For Petitioners

APPENDIX

FIRST AMENDMENT:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. I.

FOURTEENTH AMENDMENT:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

CIVIL RULE 26(c) of the WASHINGTON RULES FOR SUPERIOR COURT:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by

order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Wash. CR 26(c).